



"janes, peg" <mjanes@hq.dema.mil> on 04/22/2002 11:22:42 AM

To: "dfars@acq.osd.mil"

Subject: RE: Comments on Proposed Rule under DFARS Case 2001-D017

> -----Original Message-----

> From: janes, peg

> Sent: Monday, April 22, 2002 11:08 AM

> To: 'dfars@acq.osd.mil'

> Subject: Comments on Proposed Rule under DFARS Case 2001-D017

>
> This case implements Sec. 803 of the FY02 DoD Authorization Act. Sec. 803
> displaces the fair opportunity requirements of FARA for orders for
> services under multiple award contracts that exceed \$100,000 for a
> requirement that such orders be made on a competitive basis. As such, the
> DAR Council had replaced only FAR 16.505(b)(1)(i) and made one addition to
> supplement FAR 16.505(b)(2) in its proposed 216.505-70. Before
> publication of the proposed rule, a paragraph 216.505-70(d) was added that
> had not been seen by or proposed by the DAR Council and other
> editorial-type changes had also been made. The proposed 216.505-70(d)
> duplicates the coverage in FAR 16.505(b)(1)(ii) and does not refer to
> replacing the requirements of FAR 16.505(b)(2), as it does. To assure
> there is no confusion as to what paragraphs of the FAR are superceded, and
> to assure the proper emphasis on "competitive basis" vice "fair
> opportunity" under the revised statute, I recommend the proposed coverage
> be revised as follows. See the further rationale for these recommended
> changes below the proposed revised coverage.

> [216.501-1 Definition.
> *****] No change.

> [216.505 Ordering.

> (b) Orders under multiple award contracts-

> (70) Competitive basis.

> (i) This subsection-

> (A) Implements Section 803 of the National Defense
> Authorization Act for Fiscal Year 2002 (Pub. L. 107-107); and

> (B) Applies to orders for services exceeding \$100,000
> placed under multiple award contracts in place of the procedures at FAR
> 16.505(b)(1) and (2) (see Subpart 208.4 for procedures applicable to
> orders placed against Federal Supply Schedules).

> (ii) The contracting officer must place each order for
> services in excess of \$100,000, that is placed under a multiple award
> contract, on a competitive basis (see paragraph (iii) of this
> subsection), unless the contracting officer waives the requirement on the
> basis of a written determination that-

> (A) One of the circumstances described at FAR
> 16.505(b)(2)(i) through (iv) applies to the order; or

> (B) A statute expressly authorizes or requires that the
> purchase be made from a specified source.

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> (iii) An order for services exceeding \$100,000 is made on a
> competitive basis only if the contracting officer-

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> (A) Provides a fair notice of the intent to make the
> purchase, including a description of the work the contractor must perform
> and the basis upon which the contracting officer will make the selection,
> to all contractors offering such services under the multiple award
> contracts; and

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> (B) Affords **all** contractors responding to the notice a
> fair opportunity to submit an offer and have that offer fairly considered.

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> (iv) The contracting officer should keep submission
> requirements to a minimum. Contracting officers may use streamlined
> procedures, including oral presentations. The competition requirements in
> FAR Part 6 and the policies in FAR Subpart 15.3 do not apply to the
> ordering process. The contracting officer shall consider price or cost
> for each order as one of the factors in the selection decision. The
> contracting officer should consider past performance on earlier orders
> under the contract, including quality, timeliness, and cost control in the
> selection process.}

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> The statement in paragraph 216.505-70(d)(3)(i) of the proposed
> coverage (to develop placement procedures that will provide each awardee a
> fair opportunity to be considered for each order...) is not required
> because the description of "competitive basis" in the proposed
> 216.505-70(c) paragraph (my proposed 216.505(b)(70)(iii)) already
> describes the competition requirements process. It need not be duplicated
> in a later paragraph. Further, the placement procedures do not reflect
> the requirement, the requirement reflects the requirement, or so it should
> be. The statement in paragraph 216.505-70(d)(3)(ii) of the proposed
> coverage, not to use any method, such as allocation or designation of any
> preferred awardee, that would not result in fair consideration being given
> to all awardees, is unnecessary and confuses the issue, because the
> statute now requires that orders be placed on a "competitive basis" that
> affords all contractors a fair opportunity to submit an offer. Obviously,
> an allocation method cannot be used under the description of "competitive
> basis", so there is no need to mention this. With regard to paragraphs
> 216.505-70(d)(3)(iii) and (iv) of the published proposed rule, they do not
> apply to the new statutory requirements. They only apply to the "fair
> opportunity" procedures of FARA. Under the new requirements that apply to
> DoD, every contractor must be provided "fair notice" for every order over
> \$100,000. There are no special or different procures to be "tailored" or
> to be included in the solicitation. Likewise, paragraphs 216.505-70(e)(2)
> and (3) are unnecessary. (3) is already covered in 216.505-70(b)(1) (my
> proposed 216.505(b)(70)(ii)(A)). My proposed change from passive voice to
> active voice in 216.505(b)(70)(ii) reinstates the active voice proposed by
> the DAR Council that makes it clear that only contracting officers can
> place these orders since pricing and other business decisions are
> involved. I have changed the numbering so that the proposed coverage
> parallels the FAR subparagraphs ((b)(1) and (2)) we are superceding for
> clarity as to what is being superceded.

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> Note that under either version, the published proposed rule or my
> proposed replacement version above, paragraphs 16.505(b)(3) through (5) of
> the FAR continue to apply to all types of multiple award contracts. This
> **was** the intent when the DAR Council approved its version **of** the proposed
> rule.

Peg Janes